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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 478

R. MILO GILBERT,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Preliminary Statement

Respondent states in its conclusion (Br. 31):

> "Whatever legal theory is applied to the facts, they show that petitioner, without any authority whatsoever, falsely endorsed United States Treasury checks *for the purpose of obtaining money from the government to which he was not entitled . . .*" (italics added).

There is simply nothing in the record to sustain the italicized statement. The Government never claimed that the Bartfields were not entitled to the money the checks represented, and the Bartfields never claimed that petitioner

was not entitled to whatever portion of the checks he kept (R. 56) for his services.

The concluding statement in respondent's brief, quoted above, only compounds the error of its effort at the opening of its brief (p. 3) to cast the case pending before this Court as being one involving falsification of income tax returns by adding income tax deductions not incurred or not claimed by the taxpayers after they signed them and by pocketing the refunds. There are but two counts of the indictment (21 and 22 [R. 11]) before this Court. Whatever may be the correct facts as to the other counts of the indictment, as to the two counts in the case here, there is simply no problem of fraudulent return or refund application.[1]

It is enough to deal with the issues in the case before the Court without trying petitioner on other counts which have properly been reversed.

ARGUMENT

I.

The Evidence Is Insufficient (Reply to Respondent's Point I, pp. 11-15).

To say, as the Government does (Br. 11), that petitioner "conceded" that he endorsed the Bartfield names on the checks, is to suggest that there was, somehow, before the "concession" a claim or an argument by petitioner that he had not done so. This simply is not the case. The endorsements show on their face that they were made by petitioner; they were designed to, and did, so show to the

[1] Respondent eventually concedes this in its footnote 12, p. 14 of its Brief.

whole world and petitioner never claimed to the contrary. That petitioner signed the Bartfield names was stipulated to (R. 43, 47), not "conceded".

Respondent is incorrect in asserting (Br. 13) that the evidence "presents a question of credibility". The only witness whose testimony is involved is that of the Government's own witnesses, the Bartfields. Is it their credibility which is involved? Is it their conflicting testimony which the jury was supposed to resolve?

The confusion in the matter is demonstrated by Government counsel's questions in the trial court carried over in the Government's brief here. Referring to exhibits (33 and 34) which were not even introduced in evidence (R. 89, 97), trial counsel asked Mr. Bartfield (R. 42):

> "I call your attention to the top of these returns where it says 'Home Address, c/o R. Milo Gilbert, 519 Taft Building, Hollywood 28, California'. Did you ever tell Mr. Gilbert that that was your home address?"

To which Mr. Bartfield answered (R. 42): "No, sir." From this the Government argues here (Br. 4) that Mr. Bartfield never authorized petitioner to use such an address as his home address, inferring of course, that petitioner did something he was not supposed to do.

What are the facts?

Although the returns referred to were not introduced in evidence, the Government refers to them. An examination of the Bartfields' 1955 income tax return (part of Exhibit 33 for identification [R. 91]), shows on its face that petitioner had nothing to do with it.[2] And an examination of

[2] Exhibit 34 shows that petitioner did prepare the 1956 return (R. 99).

both the 1955 (R. 91) and 1956 (R. 99) income tax returns shows that the Home Address is *not* given as "c/o R. Milo Gilbert, etc." but in the 1955 return (R. 91) as "1142 S. Doheny Drive, Los Angeles 35" and in the 1956 return (R. 99) as "620 South Main Street, Los Angeles 14".

Why then the effort to infer that petitioner had somehow put in a different home address, namely his own office address, when the facts simply are to the contrary?[3]

And how can there be any question about the written power of attorney (Exh. M; R. 106-107) as a matter of law? Both the Bartfields testified that the signatures on the power of attorney were theirs. There just is no question about that.[4] The Government's effort to, without evidence, suggest that (Br. 13) petitioner submitted the power

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[3] If, as would seem to be the case, Government counsel in his questioning (R. 42) meant to refer to the Application for Tentative Carryback Adjustment (R. 95), that document does show the taxpayers' address, not *home* address, as petitioner's office, clearly, of course, for the purpose of correspondence concerning the application, the form showing on its face (R. 95) the addresses shown on the income tax returns as 1142 South Doheny Drive for 1954 and 1955, and 620 South Main Street for 1956. Both Mr. and Mrs. Bartfield signed this application showing these matters (R. 95).

[4] Mr. Bartfield was asked (R. 43-44): "I direct your attention, Mr. Bartfield, to Defendant's Exhibit M for identification, which contains the words at the top, 'Power of Attorney', and ask you if that is your signature on the left hand side?" Mr. Bartfield's answer was (R. 44): "It is." Later on he said (R. 45): "I could swear it is my signature."

As to Mrs. Bartfield's signature, Mr. Bartfield testified (R. 44): "It looks like her signature." And Mrs. Bartfield testified (R. 48): "It looks very much like my signature and I think perhaps it is." Although Mr. Bartfield testified (R. 45) that he didn't remember signing the document or petitioner asking him to and Mrs. Bartfield testified (R. 49) that petitioner did not ask her to sign a power of attorney, the authenticity of the signatures was never questioned. Aside from the positive state of the record, if there were any question about the signatures, one can be sure that handwriting expert testimony would not be absent from this record.

of attorney to the Bartfields under the guise of another document, or in blank, or that the signatures were forgeries, or that (Br. 14) he added the word "endorse"[5] after the signatures were on, is simply an exercise in fantasy. This is a criminal case. The Government's own witnesses testified they signed the power of attorney. Inference and conjecture cannot supply proof to the contrary (cf. *Nishikawa* v. *Dulles*, 356 U.S. 129).

As to the Government's final argument on the question of the sufficiency of the evidence (R. 15), it may be that the Bartfields did not see the checks until shown them by Government agents (R. 43), but there is no evidence in the record that there was any concealment by petitioner or that the Bartfields did not get whatever they were entitled to.

II.

No Forgery Was Committed Here.

A.

The endorsements did disclose an agency or representative relationship on their face. (Reply to Respondent's Point II, A, pp. 16-20.)

Without the actual exhibits (31 and 32) to look at, it cannot with assurance be said that the endorsements did not have the word "by". Clear it is that the case was tried on the theory, and all parties, including the trial judge,[6]

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[5] In the light of the broad language of the document, an irrelevant addition.

[6] Respondent's suggestion (Br. 19, f.n. 15) that the trial judge in referring to the "by" endorsement (R. 63, 64) was referring to other counts involving checks which did have "by" on them is unsupported. The fact that some of the checks did contain "by" would lead to a comment somewhere that the checks in Counts

were of the view that the endorsement did contain the word (see f.n. 4, p. 5, pet. open. br.). The case should be so viewed here, particularly since in the re-trial on the other counts (R. 126), the same legal issue will be present.

But even without the "by" present, the endorsements show on their face an agency or representative capacity. The addition of the word "trustee", regardless of its technical legal meaning, shows that the signer is signing for someone else. This, coupled with the fact that the payees on the face of the check were "c/o R Milo Gilbert" makes that conclusion inescapable. And, with due deference to respondent's contrary statement (Br. 16) we assert that the mere observation of the signatures on the back of the check shows that they clearly were written by the same hand and person. (Cf. *United States* v. *Stradley*, 295 F. 2d 33, 35 (C.A. 4 1961).)

B.

There was no forgery within 18 U.S.C. 495.
(Reply to Respondent's Point II, B, pp. 20-29.)

It is not so much the showing of agency or representation that makes the endorsements here not forgery. It is the fact that there was no palming off, no pretense that the act is that of another. As quoted in *Fitzgibbons Boiler Co.* v. *Employers Liability Assurance Corporation*, 105 F. 2d 893, 895 (C.C.A. 2 1939) from Judge Lehman's opinion in *International Union Bank* v. *National Surety Co.*, 245 N.Y. 368, 372: "'The test of forgery is whether a person has falsely and with purpose to defraud made a writing which purports to be the act of another.'" Where, as here, the no-palming off is clear from the face, there can be no forgery.

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21 and 22, the foundation for the institution by the Government of the case altogether (R. 108), did not. No such comment appears.

The fact that 18 U.S.C. 495 as originally enacted and even now deals with fraud does not help in solving the problem of what constitutes forgery when a man is charged with that crime.[7] Nor is respondent's outline of the legislative history (Br. 22-23) entirely accurate. The second section of the original statute (3 Stat. 771, 772) punishing possession has not been eliminated from the law. It became § 5422 of the Revised Statutes (42 Cong. Rec. 730; 35 Stat. 1094), then 18 U.S.C. (1940 ed.) 74 and it is now 18 U.S.C. 1002.[8]

The argument of the Government that because the original statute had a proviso (3 Stat. 772) not depriving the states of jurisdiction over their crimes as an argument that under 18 U.S.C. 495, forgery is not forgery, proves too much. That proviso is in the law today as to *all* the crimes in 18 U.S.C.[9]

It does not follow (Govt. Br. 23) that because Congress enacted a statute having to do with fraud of the Government,[10] one of the prohibited acts being forgery, that Congress intended a broad construction. Rather does it follow that when Congress enacted a criminal statute, it intended to say what it meant and mean what it said (*United States*

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[7] Chapter 47 of the present 18 U.S.C. (18 U.S.C. 1001-1026) deals entirely with "Fraud and False Statements". That fact could hardly be used as an argument that something which is not forgery, is.

[8] The Congressional debate referred to in respondent's f.n. 20, p. 22, had to do with another section of the revision which combined §§ 5418 and 5479 of the Rev. Statutes. The Revised Statute forerunner to 18 U.S.C. 495, the statute involved in the case here, was § 5421. That section was not changed in the 1909 codification save with reference to minimum penalty (42 Cong. Rec. 730).

[9] Today it is at 18 U.S.C. 3231. After 3 Stat. 772, it became Rev. St. 5328, then 18 U.S.C. (1940 ed.) 547.

[10] Incidentally, the record in this case, as pointed out above, is such that it cannot be said that anyone was defrauded here.

v. *Henning*, 344 U.S. 66, 75), and that the usual rules of strict construction of a criminal statute should apply.

Respondent is in error as to its understanding (Br. 24) of the common law meaning of forgery. In the first place, there was no alteration of a writing here. Secondly, the Government's description of common law forgery as "comprehending any alteration of a writing, for fraudulent purposes, that gives an appearance of truth to a falsity", begs the question. Since what we are talking about is an endorsement which shows on its face who did the signing, it is not, by its very nature, "a falsity". It states, precisely as the cases have held, the very thing that occurred.

But pass that. The very reference in East relied upon by respondent (Br. 24) recognizes (3 East, Pleas of the Crown 852 [1823]) that "Lord Coke indeed seems to confine (forgery) in strictness to an *act done in the name of another*" (italics added).[11]

Respondent's citation (Br. 24) of *United States* v. *Osgood*, 27 Fed. Cas. No. 15,971a, p. 663 (C.C. S.D. N.Y.) is inapposite here. What the court was talking about was that to be forgery, it is not necessary that the entire affidavit presented in that case for a pension be false; that since, in order to be a proper application, the affidavit had to have a proper jurat and since the recorder's name to that jurat was forged, that was sufficient to be forgery. This, of course, is what forgery traditionally is.

United States v. *Staats*, 8 How. 41 (1850) despite respondent's unhappiness with it (Br. 25, f.n. 21), demonstrates

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[11] And in discussing various cases, even East (*ibid.*, p. 965) calls attention to the case of *Parkes and Brown*, 2 Leach 898, S.C., which defined forgery as ". . . 'the false making a note or other instrument with intent to defraud:' which might be done either by using the name of one who did not exist or of one who did exist, without his consent . . ."

that this Court early agreed with the traditional meaning of forgery under that portion of 18 U.S.C. 495 at issue here.

The case of *Regina* v. *White*, 2 Car. & K. 404 (1847), rather than, as suggested by respondent (Br. 26) being a writing of a restrictive qualification into the definition of forgery, was simply the recognition of what forgery was and is (see Pet. Br. 10). The enactment of legislation by the British Parliament (Govt. Br. 26) emphasizes the point. Here, too, if Congress wants to punish the writing or using of another's name without authority, it knows how and may certainly do so. Indeed it already has (18 U.S.C. 1001) and the Government, in the very indictment in this case (R. 9-10; Counts 18-20) has brought counts under such a statute. But that is scarcely an argument for saying that when Congress said "forgery", it meant something else.[12]

Respondent recognizes (Br. 26) that it is advancing a minority view of the law in this country and suggests (Br. 28) that *Selvidge* v. *United States*, 290 F. 2d 894 (C.A. 10 1961) and all the other cases cited in Petitioner's Opening Brief were wrongly decided. We disagree. There is no reason why the statute at bar should be construed any differently than any other criminal statute; the rule of strict construction should apply.

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[12] Of course, if Congress wanted or wants to define "forgery", it can do so, and it may define it as it likes (within applicable constitutional limits, of course), but until it states to the contrary, forgery means forgery. As said in *Martyn* v. *U. S.*, 176 F. 2d 609, 610 (C.C.A. 8 1949), a case involving Section 3 of the National Stolen Property Act, 18 U.S.C. 415, regarding transportation of forged securities: "It is possible, of course, that Congress, when it enacted the statute in suit, may have intended or supposed that the statute would cover the transportation of such checks, but, if so, the language used did not adequately express that intent. It is elementary that a criminal statute must be strictly construed."

C.

The endorsement was not by a fictitious person.
(Reply to Respondent's Point II, C, pp. 29-30.)

If the word "by" was in the endorsements, this part of the Government's argument must fall of its own weight as we have discussed under Point II, B, supra.

But in any event, the effort to equate the addition of the word "trustee" to petitioner's own name to those cases where a fictitious, non-existent person's name is written is, we submit, impermissible. The question goes back to: what is forgery? In the non-existent person cases, there is a palming off, a stating that something was done by someone when it is not done by him at all. That is not the case here. Indeed it is just the opposite. The addition of that word shows (what is apparent from the writing itself anyway) that R. Milo Gilbert, no matter what his capacity, and not the Bartfields, is doing the writing. This reinforces petitioner's argument that there can here, therefore, be no forgery.[13]

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[13] The matter is explained in *United States* v. *Greever*, 116 F. Supp. 755, 756 (D.C. D.C. 1953) in harmonizing *Milton* v. *United States*, 110 F. 2d 556 (C.A. D.C. 1940), one of the cases cited by respondent (Br. 29). In that case the defendant signed checks in the name people knew him, though not his real name and though he had no account in the bank.

> "The decisions can only be harmonized on the rationale, adopted in the English case of Reg. v. Martin (1879), 14 Cox, Cr. Cas. 375, 5 Q.B. Div. 34, that though there may be fraud and false pretenses, there has been no forgery where the payee in accepting the check has relied upon and given credit to the person who has signed and presented the check, and not the signature itself. It is only in a case where reliance is placed on the signature as creating a valid obligation, not on the person who presents the check, that forgery has been committed.
>
> "While on the facts submitted to the Court it appears defendant is guilty of a crime, it is necessary that the Court

Conclusion

The convictions should be reversed and the counts ordered dismissed.

Respectfully submitted,

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assure him the right to answer a correct charge of crime. On the state of the law as set forth by the decided cases, the Court must decide that the proper charge against defendant is false pretenses and not transportation of a forged check in interstate commerce, and accordingly a judgment of acquittal must be granted."